

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 75-7698

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

GEORGE C. FREY READY-MIXED CONCRETE, INC.,  
GEORGE C. FREY BATCHING PLANT, INC. and  
HERBERT FREY and LOIS MUCK, as co-executors of  
the Estate of GEORGE C. FREY, Deceased,  
*Plaintiffs-Appellants,*

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND  
& GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH  
PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL,  
individually and as the Controlling and surviving Direc-  
tors, Officers, Shareholders, Liquidators and Receivers  
of the assets of PFOHL BROTHERS, INC., a dissolved  
corporation, and PFOHL BROTHERS, INC.,  
*Defendants-Appellees.*

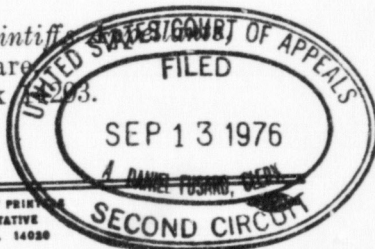
APPEAL FROM THE FINAL DECISION, ORDER AND JUDGMENT OF  
THE UNITED STATES DISTRICT COURT FOR THE WESTERN  
DISTRICT OF NEW YORK AT CIVIL ACTION No. 1970-277.

## BRIEF FOR PLAINTIFFS-APPELLANTS

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# United States Court of Appeals

For the Second Circuit

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**Docket No. 75-7698**

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GEORGE C. FREY READY-MIXED CONCRETE,  
INC., et al.,

*Plaintiffs-Appellants,*

vs.

PINE HILL CONCRETE MIX CORP., et al.,

*Defendants-Appellees.*

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## **BRIEF FOR PLAINTIFFS-APPELLANTS**

### **Statement of Issues Presented for Review**

1. Did the complaint fail to state a claim under either the Sherman or Clayton Acts?
2. Did the District Court err in granting summary judgment on the Sherman and Clayton Acts claims, despite substantial issues of fact?
3. Should the "non-federal" claims have been dismissed for lack of jurisdiction after five years of litigation?
4. Did the District Court err in refusing to grant appellants' threshold motion for separate trials?
5. Did the District Court err in failing to consider events barred by the statute of limitations in granting summary judgment on the antitrust issues?
6. Did the District Court err in failing to consider facts ascertained by appellants subsequent to filing the complaint?

7. Are the concrete ready-mix, aggregate and construction industries in Western New York engaged "in", or do they "affect commerce" under the Sherman or Clayton Acts?

8. Did the District Court err in depriving appellants of pretrial discovery?

9. Did the District Court err in granting appellees' motion for summary judgment prior to completion of appellants' discovery and service of their amended complaint?

10. Should appellants have been allowed to serve an amended complaint?

### Statement

Plaintiff, a ready-mixed concrete producer in Western New York, appeals from a Decision and Order of the District Court for the Western District of New York which granted defendants' motions to dismiss for failure to state a claim under Rule 12(b)(6) and for summary judgment under Rule 56 (A 406, 603, 614, 615).<sup>1</sup>

The action was commenced on June 17, 1970 (A 7) by a complaint which alleged six claims. The First Claim charged monopolization, attempted monopolization, and various restraints of trade, as well as a conspiracy amongst the defendants for said purposes, in violation of the Sherman Act and

<sup>1</sup> References in this brief are as follows:

"A" references are to pages of the Joint Appendix.

"R" references are to items in the Record on Appeal, and "p." or "pp." refers to pages thereof.

"SR" references are to items of the Supplemental Record.

the Clayton Act.<sup>2</sup> Claims Second through Sixth, were diversity claims.<sup>3</sup>

Early in the proceeding plaintiffs moved the Court for separate trials under Rule 43(b) in order to expedite the action (A 161). Appellants sought a preliminary separate trial on the May 17, 1949 gravel supply agreement (Exhibit 1, following A 177; A 209), and a subsequent second trial of the following antitrust issues:

A. Did defendants' acquisition of the gravel deposits, plants and business of their competitor, the defendants Pfohl (plaintiffs' supplier) violate Clayton Act § 7 and/or Sherman Act §§ 1 and 2?

B. Did defendants violate Sherman Act §§ 1 and 2 by monopolizing plaintiffs' sources of gravel in the Buffalo area in acquiring plaintiffs' Gravel Supply Agreement and the facilities connected therewith?

C. Did defendants engage in trade restraints, price fixing, tying arrangement, rebates, preferences and refusals to deal, price cutting, conspiracies to monopolize, monopolization, acquisition of competitors', etc., in violation of Sherman Act §§ 1, et seq. and Clayton Act §§ 1, et seq.?

The Court never ruled on plaintiffs' said motion for separate trials.

<sup>2</sup> The charges were expanded in many of the pleadings subsequently filed (A 161; A 399; A 508; R. 50; R. 76; R. 84; etc.).

<sup>3</sup> The Second Claim realleged the First Claim as a diversity claim in violation of the New York Antitrust Statute (General Business Law §§ 340, et seq.); the Third Claim alleged breach of a gravel supply agreement; the Fourth Claim alleged failure of consideration for the sale of appellants' gravel facility and requested rescission and reverter of title; the Fifth Claim requested declaratory judgment that plaintiffs were still the owners of said gravel facility; and the Sixth Claim alleged unfair competition.

Defendant served a notice of taking depositions, and a motion for discovery, on July 28, 1970. The Court granted said motion on September 15, 1970 (A 28, 37, 40). Plaintiffs served their first, of many, notices of taking depositions on December 9, 1970 (A 68). Defendants commenced taking depositions of plaintiffs on March 3, 1973 and continued on a sporadic basis through December 30, 1974.<sup>4</sup>

Defendants never were able to take a single deposition during the entire pendency of this action. The District Court nevertheless considered defendants' motion to be one for summary judgment under Rule 56 rather than for a failure to state a claim under Rule 12, because "numerous affidavits have been filed and *depositions taken*" (A 604). Plaintiffs, without any success, made numerous motions, and notices and requests seeking to compel discovery, to take depositions, to compel answers to interrogatories, to compel production of documents, and to defer defendants' discovery.<sup>5</sup> The District Court, and the Magistrate to who the matters were later referred (A 286), refused to allow plaintiff any relief. The District Court refused to hear plaintiff's appeal from the Magistrate's Order (A 291, 355, 356).

<sup>4</sup> Defendants took plaintiffs' depositions on March 5, 6 & 13, 1973, November 8, 9, 21 and 25, 1974 and December 30, 1974 (R. 90-101; A 617 *et seq.*).

<sup>5</sup> The discovery history was as follows:

<i>Pleading</i>	<i>Date</i>	<i>Reference</i>
Defendants' motion for discovery	7/28/70	A 28
Defendants' notice of taking depositions	7/28/70	A 37
Order granting defendants' motion for discovery	9/15/70	A 40
Plaintiff's first interrogatories to defendants	11/23/70	A 43
Plaintiff's notice of taking depositions	12/ 9/70	A 68
Defendants' objections to plaintiff's interrogatories	1/ 4/71	A 71
Plaintiff's motion for order compelling discovery	2/15/71	A 77

<i>Pleading</i>	<i>Date</i>	<i>Reference</i>
Plaintiff's second interrogatories to defendants	2/24/71	A 80
Defendants' objections to plaintiff's second interrogatories	3/30/71	R. 14
Plaintiff's motion for order striking pleadings for defendants' failure to appear for depositions or comply with discovering schedule; and/or alternatively compelling defendants to answer interrogatories and appear for depositions	4/16/71	A 91
Plaintiff's motion to compel answers to interrogatories	4/27/71	A 94
Order establishing discovery schedule with plaintiff to commence depositions on 8/9/71	5/ 7/71	A 95
Plaintiff's cross-motion for contempt order for, <i>inter alia</i> , failure of defendants to answer interrogatories	5/13/71	A 107
Plaintiff's motion for separate trials, etc.	6/ 7/71	A 161
Order amending discovery schedule with plaintiffs to commence depositions on 8/16/71	6/ 9/71	A 178
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Plaintiff's notice of taking depositions	2/13/73	A 211
Plaintiff's motion for order granting leave to proceed with discovery and deferring defendants' discovery	5/18/73	A 212
Order denying plaintiff's motion to proceed with discovery	5/31/73	A 223
Plaintiff's motion to compel discovery and/or for discovery in "waves"	6/ 1/73	A 225
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Order referring supervision of discovery to Magistrate	10/16/74	A 286

<i>Pleading</i>	<i>Date</i>	<i>Reference</i>
Plaintiff's notice of taking depositions	10/16/74	A 287
Magistrate's order setting discovery schedule with plaintiffs to commence discovery by December 6, 1974	10/22/74	A 288
Plaintiff's notice of appeal to Court from order of Magistrate deferring plaintiff's discovery	10/22/74	R. 56
Plaintiff's notice of argument of appeal to Court (R. 56) from Magistrate's order deferring plaintiff's discovery	10/22/74	A 291
Order denying plaintiff's motions on discovery	11/20/74	A 352
Plaintiff's notice of production and discovery	11/27/74	A 370
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Defendants' affidavits and memorandum in support of objections to notice to produce	12/17 & 19/74	A 379-396, and R. 62
Plaintiff's affidavits in support of discovery	12/27/74	A 397 R. 63
Plaintiff's report to the Court on extent of defendants' discovery	1/ 9/75	R. 64
Plaintiff's application to defer defendants' motions to dismiss until plaintiffs complete their discovery	1/13/75	A 1335
Defendants' motion for stay of discovery	1/24/75	A 479
Plaintiff's motion and affidavits for leave to serve amended and supplemental complaint and for discovery (A 518-9, 522)	3/ 7/75	A 488-522
Plaintiff's motion for an order compelling discovery before defendants' motion to dismiss	5/ 6/75	A 547
Plaintiff's letter to Court requesting leave to depose defendants at least as to the "commerce issues"	7/31/75	A 1330
Plaintiff's cross-motion and affidavits for leave to complete their discovery	8/18/75	A 580-599

During this entire period, plaintiffs, as can be noted from the footnote below, made numerous efforts to commence depositions. Each time, the Court, or the Magistrate, allowed Defendants more time for their depositions and deferred plaintiffs' time for discovery. In the end, defendants moved to dismiss and for summary judgment without plaintiffs having had any depositions.

Plaintiffs did serve written interrogatories on defendants early in the case. The answers, which were not readily forthcoming, contained objections to the most pertinent interrogatories. Plaintiffs moved to compel answers to these interrogatories but were never able to obtain a ruling from the Court (See fn. Discovery History, *supra*).

Plaintiff's attempts to obtain production and discovery were deferred until the end of December, 1974. Initially, plaintiffs had objected to a "non-mutual" production request, because of the admittedly highly competitive relationship between the parties and the confidential nature of their operations (A 234). The Court denied the motion (A 236) and defendants had a complete examination of every facet of plaintiffs' business<sup>6</sup> from income tax returns to purchases, sales, customers, expenses, salaries and operations (R.64). When plaintiffs were finally allowed to examine defendants' documents, they were granted access only to limited records, namely: certain invoices and purchases (A 490; A 547; A 397; R.63).

---

<sup>6</sup> Defendants apparently used this confidential data they obtained from their discovery of plaintiff's records to defendants' competitive advantage (See Facts, "G", *infra*).

Plaintiffs had an opportunity only to scan<sup>7</sup> these records and were never able to complete the defendants' documents even in the limited categories to which defendants made no objection (A 547, 1335).

## Facts

### A. The Principal Parties

Plaintiff\* Frey Concrete, Inc. (hereafter "Frey", "Frey Concrete" or "plaintiff") has been in the business of producing and selling ready-mixed concrete in the Buffalo area since the late '40s (A 110, 165-6). Frey Concrete is a family corporation founded by and run by the family of, the late George C. Frey (Complaint ¶¶ 2-3, A 8, 109, 167).

Defendant Pine Hill Concrete Mix Corp. (hereafter "Pine Hill") has also been in the business of producing and selling ready-mixed concrete in the Buffalo area since the late '40s (A 172, 8).

<sup>7</sup> During this initial, and very much circumscribed discovery of defendants' records, plaintiffs were only able to sample defendants' invoices and purchase records. This turned out to be the tip of the iceberg (Exhibits C through J following A 522). Apparently, defendants had inadvertently allowed plaintiffs to see defendants' invoices which revealed defendants' rebate system whereby defendants other companies such as the defendants Regent Guadco, Land-Fill, etc. have rebated to defendants to the extent of almost \$500,000.00 a year which made it possible for defendants to cut prices and sell at a loss (See Facts, "E", *infra*). It was developed during this time that defendants had vast purchases of cement from outside the state, and outside the United States (See Facts, "I", *infra*). After this initial inspection, defendants removed this damaging material from the files, and plaintiffs were not allowed to obtain any further information in this connection (A 551).

\* Subsequent to the commencement of this action Frey's batching plant company, and Frey's ready-mix delivery company, were merged into a single company, under the name Frey Concrete, Inc. (A 289; R.89 p. 40; A 490). Thus all plaintiffs can be deemed to be a single plaintiff for purposes of this appeal.

Defendant Ludwig F. Kahle is the principal and controlling shareholder of Pine Hill, as well as of the other defendant corporations (Complaint ¶ 5, A 9, 182, 188, 192-3, 76, 467, 384).

Defendants Pfohls (hereafter collectively "Pfohl") are the corporation known as Pfohl Bros., Inc. (and its liquidating directors), which defendant Pine Hill acquired in 1957 (A 170, 504-5, 522). Defendant Kahle immediately assumed the presidency of Pfohl (R. 22, Exhibit 8, following A 177; A 10, 16, 467).

#### **B. Relationship of the Parties**

Pine Hill and Frey compete in the ready-mixed concrete market in the Metropolitan Buffalo Area. Frey is Pine Hill's largest competitor (A 251, 268, 380, 570-1, 589-91, 506; R.89, p. 40; Complaint ¶¶ 10, 4, 16, 28, A 11-12, 18).

Defendant Kahle controls Pine Hill and defendants Kahle and/or Pine Hill control defendants Regent and Pfohl, and potential defendants Quadeo and Land-Fill (Complaint ¶¶ 5, 7, 23, 26 & 28; A 9, 14-15, 17; A 383, 415, 465, 493-4, 298, 182, 188, 192).

Pine Hill's volume is approximately 150,000 yards/year<sup>9</sup> (A 521). Frey's volume is about 50% of Pine Hill's volume (A 117, 175).

Pine Hill also sells, and uses, concrete grit and concrete gravel (hereafter "grit" and "gravel").<sup>10</sup> Pine Hill purchased some of this from the defendant Regent Sand and Gravel

<sup>9</sup> "Yards" refers to cubic yards of concrete.

<sup>10</sup> See. Facts "C" & "D", *supra*, for definitions.

Corp. (hereafter "Regent") and resells it to Frey. This grit and gravel was produced at Frey's former plant, which it sold to Pfohl in 1949, and which Pfohl, in turn, sold to defendants in 1957.<sup>11</sup> Frey was Pine Hill's largest customer for this grit and gravel, and the only ready-mixed concrete customer. Also, it was the only customer supplied from its former plant (A 277, 306, 268, 258). Regent pays as much as \$90,000 per year to Pine Hill in inter-company charges (A 512-3, 383; R. 60, p. 5).

Plaintiff sought to add as additional parties defendant, two affiliates of defendants, Quadco Hauling Corp. (hereafter "Quadco") and Lancaster Sanitary Land-Fill, Inc. (hereafter "Land-Fill") but no ruling was ever made thereon (A 289).

Quadco, which was formerly owned by Pfohl and was included in Pfohl's 1957 sale to Pine Hill (R.72, Exhibit B, following A 522), was used by Pine Hill to deliver its gravel to Frey at a charge of 70¢ to 90¢ per ton. Quadco rebated to Pine Hill as much as \$144,000 per year (A 510, 266, 294-9, 360-1).

Land-Fill, which was also owned by defendants, was a company which filled-in, with garbage and refuse, defendants' excavated gravel lands, and rebated to Pine Hill as much as \$444,000 per year (A 509-10, 553).

Plaintiff charged that defendants used the Regent, Quadco, Land-Fill and other rebates and/or inter-company charges as a means of subsidizing, by \$3.30 per yard, defendants' below-cost sales of ready-mixed concrete, at a "fixed price" of \$22.00 per yard over 5 operating years, which price was as much as \$3.00 per yard below plaintiff's price (Exhibits C to J following A 522, A 506-7, 521, 588, 361-2, 296-8, 304, 252, 255, 266; R. 63, p. 8).

<sup>11</sup> In 1969, defendants caused Pfohl to belatedly record a deed retroactive to 1957 conveying Frey's gravel plant to Regent, rather than Pine Hill (A 467; Complaint ¶¶ 26 & 27 (b); A 9-10). Early in the case, defendants claimed that Regent was not an operating company (A 125).

### C. The Ready-Mixed Concrete Product

Concrete is composed of cement, water, concrete sand or grit under  $\frac{1}{4}$ " in diameter (hereafter "grit"); and coarse aggregates, such as Number 1 and/or Number 2 gravel (under  $\frac{1}{2}$ " or under  $1\frac{1}{2}$ " respectively, and hereafter "gravel"). A "yard" of concrete contains between 1.5 to 1.75 tons of grit and gravel on a 50-50 basis (A 263, 360; Complaint ¶¶ 14-15, A 5; R. 22, Exhibit 1, following A 177). For special applications, concrete may also contain special additives and/or light-weight aggregates (A 563-4).

The binder in concrete is cement, manufactured by dehydration of limestone. Depending on the application, each yard of concrete may contain between  $4\frac{1}{2}$  to 6 bags<sup>12</sup> (an average of 5 bags) of cement.

### D. The Gravel Ingredient Supply

Grit and gravel<sup>13</sup> totaling between 1.5 to 1.75 tons are used in each yard of concrete (A 263, 270). The gravel is mined from so-called gravel pits. It is then washed and screened. Grit is a natural and inevitable product of the screening and washing process (A 418, 275-6, 369 ¶¶ 6, 364).

Prior to 1949, Frey and Pine Hill each had their own gravel pits or supplies, as well as their own washing and screening plants. Frey sold its gravel supply and washing plant<sup>14</sup> to

<sup>12</sup> A bag of cement weighs 94 pounds. A barrel contains 4 bags or 376 pounds of cement. Therefore, an average yard of concrete has about 470 pounds of cement and 1.5 to 1.75 tons of grit and gravel. (ASTM Std. Spec. C-150).

<sup>13</sup> While there is some degree of substitutability for gravel in concrete for some applications, there is little or no substitutability for grit (A 515).

<sup>14</sup> Referred to as the "Pavement Road" or "Peppermint-Pavement Road" Plant (A 313).

Pfohl in 1949, pursuant to an agreement that Pfohl would supply Frey with its grit and gravel requirements on a long term basis, at prevailing pit prices negotiated annually, less a 20% quantity discount, and less a 2% cash discount (A 166, 170, Exhibit 1 following A 177, 301, 304-6, 311, 347-51, 500-2).

The purpose of the agreement was to insure Frey of a grit and gravel supply, so that it could compete with Pine Hill which had its own plant and supply (A 347-51). To this end, the agreement prohibited Pfohl from entering the ready-mixed concrete business (Exhibit 1, ¶ 7, following A 177).<sup>15</sup> Pfohl also had a first option on any gravel deposits subsequently acquired by Frey (*Ibid.*, ¶ 7).

Frey and Pfohl operated satisfactorily under this arrangement from 1949 to 1957. They mutually negotiated prices and terms for the sale of grit and gravel (A 166-9, and Exhibit 1, ¶¶ 16-17 & Exhibits 2-7 following A 177). Pfohl was obligated by the agreement to deliver the grit and gravel into plaintiff's bins, without additional charge, (A 166, and Exhibit 1, ¶¶ 11 & 15 following A 177).

In 1957 defendants acquired Pfohl, Frey's sole source of supply of grit and gravel at its Lancaster plant, and Frey's supply contract (Exhibit B, ¶ 13, following A 522, A 465). This climaxed a series of gravel acquisitions and gave Pine Hill a 100% monopoly over all of the available gravel<sup>16</sup> in Erie County (A 305-6, 514-5, 170, Complaint ¶¶ 28, 16-17, 22, A 1 *et seq.*).

Pine Hill, almost immediately, raised the price of grit and gravel to Frey (A 170-1, and Exhibit 1, ¶ 17 & Exhibit 8

<sup>15</sup> Pfohl violated this by joining with defendant Regent and others to form Queen City Ready-Mixed Concrete Corp. Queen City was later sold to Pine Hill (A 190, 197, 1341, 502, Exhibit B following A 522).

<sup>16</sup> Clarence Sand & Gravel is an exception, but its grit and gravel are used exclusively for its own ready-mixed concrete production (A 514).

following A 177). In 1968, Pine Hill again raised the price and again refused to enter into the price negotiations, or follow the price standards provided by the agreement (Exhibits 10 & 11 following A 177). Price increases followed in 1970 and 1974, all without the negotiation contemplated by the Agreement. The price increases were not based on increased costs but were discriminatory and "tailored" increases for grit, gravel, and delivery costs (A 264-7, 363-5, 514-6, 247-7, 239-42).

In addition, Pine Hill was sending plaintiff dirty, improperly graded and wet gravel. Defects were caused by defendants' failure to keep Pfohl's washing plant up-to-date.<sup>17</sup> The former defect caused plaintiff to lose customers, and the latter defect represented 5% excessive moisture, or in effect a 5% overcharge by Pine Hill (A 261-3, 296-304, 363-5).

Plaintiff started buying some of its materials outside of Erie County—and had to deliver them over a 43 mile distance, with delivery costs which made Frey's concrete non-competitive (A 306).

Plaintiff also started a small gravel pit at Alexander in Genesee County. While plaintiff was negotiating to purchase some necessary additional land (a landlocked parcel of value only to plaintiff), defendants purchased the parcel and blocked any further expansion of plaintiff's Alexander gravel source (A 312, 514).

#### **E. Defendants' concrete and gravel pricing policies**

Defendants simultaneously fixed their gravel prices at an unreasonably high level, and their ready-mixed concrete prices at an unreasonably low level.

<sup>17</sup> Pfohl had ordered, and was about to install, "Eagle" Brand sand classification equipment in 1957. Defendants never installed this or other necessary modifications on Frey's plant, as they did on their own plants (A 260, 313, 366).

The demonstrated purpose was to prevent Frey from competing in price, and defendants improtuned, and purloined away, Frey's customers based on Pine Hill's below cost concrete prices. Pine Hill managed by this strategy, to take away all but three of Frey's concrete "wall" customers, and defendants were able to substantially underbid Frey on almost all commercial work. Typically, Pine Hill maintained the price for wall-mix concrete, at a below-cost level of \$22.00 per yard from April 1971 until the litigation was dismissed (A 252-5, 262-70, 296-304, 361-2, 506-8, 521).

Defendants fixed and maintained this 1971 price despite "double-digit inflation";<sup>18</sup> substantial cement price increases; and a host of other increases which would have indicated at least a \$25.00 per yard price. For example, defendants maintained this fixed price despite: cement increases of \$1.70 per yard of concrete; claimed gravel and delivery increases of \$0.55 per yard; labor and equipment increases; and "double-digit inflation" which made it a "below-cost"<sup>18a</sup> price (A 254-7, 278, 304, 502-3, 515-6, 521, 239, 279-81).

Defendants were apparently conducting a two-pronged price offensive against plaintiff—*FIRST* by fixing high gravel and delivery prices for Frey, its largest gravel customer in order to force Frey to raise its concrete prices; and *SECONDLY*, by fixing a below-cost \$22.00 concrete price for the Buffalo market, and using these artificially depressed prices to actively purloin Frey's customers. Frey was unable to meet this \$22.00 price, and had to raise its prices to \$23.70, and finally to \$25.00,<sup>19</sup> just to break-even (A 588, 521, 506).

<sup>18</sup> Defendants indicted themselves when they cited the inflationary increase in expenses in support of their attempt to increase gravel prices (A 247).

<sup>18a</sup> Defendants even gave further discounts and rebates to bring the price down to \$20.50 (A 402, 405h).

<sup>19</sup> It could not get any business at \$25.00 and had to reduce it back to \$23.70 (A 588).

Pine Hill carried this on from 1971 to 1975, while this litigation was pending. Pine Hill solicited Frey's customers on the promise that it would maintain the \$22.00<sup>19a</sup> price. At the same time that it was requesting the District Court to increase its prices to Frey for gravel and trucking. As a result, Pine Hill took away all but three of Frey's "wall customers", and Frey was unable to compete for other business. Frey lost between \$100,000 to \$200,000 each year as a result (A 520-2, 506, 360-7, 304-6, 311, 254-5, 266).

Pine Hill "financed" this two-pronged offensive in two ways,—*First*, by claiming false expenses to justify exorbitant gravel and trucking prices to Frey; and *Secondly*, by subsidizing Pine Hill's below-cost concrete sales by rebates and inter-company charge-backs from Pine Hill's affiliates, including the defendant Regent.

First, as to grit and gravel prices, defendants unilaterally raised gravel prices, tailored to the competitive result Pine Hill wished to achieve in its offensive against Frey.

In 1968, when Pine Hill wanted to eliminate Frey as a competitor, it raised the price of grit by almost 50% (\$2.20 to \$3.20 per ton) while only raising the gravel price by 5% (\$2.40 to \$2.50 for No. 1, and \$2.20 to \$2.30 for No. 2), despite the fact that defendants admit that grit and gravel are made simultaneously—and that you can't make one without the other.

In 1974, defendants reversed their strategy, and in order to force Frey to buy their grit at the already exorbitant price of \$3.50 per ton, raised the gravel price \$.50 per ton without raising the grit price.

Defendants' grit and gravel pricing policies were out-of-step with the out-of-county quarries that Frey finally had to

<sup>19a</sup> It even gave them rebates, discounts and waiting time credits which brought the net price down to about \$20.50 (A 402, 405h).

resort to.<sup>20</sup> During this period, Pine Hill refused to meet with Frey and negotiate the grit and gravel prices, as contemplated by the Pfohl Agreement with Frey (A 513, 505, 258, 363-7; Complaint ¶ 27(b), A 16, and Exhibit 1, ¶ 17 following A 177).

The chart below, which was submitted to the District Court (A 270) showed that none of the other gravel producers (the only others were outside of Erie County) increased their gravel or grit prices during this 1968 to 1974 period, and in fact, the price of grit generally decreased:

COMPARISON OF FREY'S GRIT & GRAVEL PRICES

Supplier	Year	Concrete Grit (20% + 2%)		No. 1 Gravel		No. 2 Gravel	
		Pit Price	Net Price	Pit Price	Net Price	Pit Price	Net Price
Defendant							
PINE HILL	1967	2.20	1.725	2.40	1.882	2.20	1.725
(Buffalo)	1968-69	3.20	2.509	2.50	1.960	2.30	1.803
	1970-74	3.50	2.744	3.00	2.352	2.75	2.156
	(Proposed 1974)	3.50	2.744	3.50	2.744	3.25	2.548
DAN							
GERNATT	1969	—	1.30	—	—	—	—
(North Collins)	1970	—	1.45	—	—	—	—
	1971-74	—	1.65	—	—	—	—
GENERAL							
CRUSHED STONE	1968	—	1.35	—	1.35	—	1.35
(Machias	1969	—	1.40	—	1.40	—	1.40
Plant)	1970	—	1.30	—	1.50	—	1.50
	1971	—	1.30	—	1.45	—	1.45
	1972	—	1.30	—	1.50	—	1.50
	1973-4	—	1.30	—	1.55	—	1.55
BUFFALO							
SLAG CO.	1969	—	1.30	—	1.30	—	1.30
(Franklinville	1970	—	1.30	—	1.30	—	1.30
Plant)	1971	—	1.50	—	1.50	—	1.30
	1972	—	1.50	—	1.50	—	1.50
	1973-4	—	1.30	—	1.20	—	1.20

<sup>20</sup> Frey had to eventually purchase its grit from 43 mile distant out-of-county suppliers because defendants supplied Frey with over-priced, dirty, wet, and misgraded grit (A 365, 515-7, 312-3, 259-60).

Defendants made similar unjustified price demands with respect to trucking charges. The Pfohl agreement provided that the grit and gravel was to be delivered, without extra charge, into Frey's bins or hoppers (Exhibit 1, ¶¶ 11 & 16, following A 177). Nevertheless, defendants refused to deliver to Frey without a 70¢/ton delivery charge. The Court originally granted an order to show cause on May 5, 1971, which directed defendants to sell to plaintiff on a delivered basis, and at the lower of defendants' 1967 price on the prevailing prices charged to Pine Hill or Regent (A 97). Defendants objected to this (A 99) and the Court, on defendants' motion, amended the May 5, 1971 order to require plaintiff to pay the 1970 prices (a second increase over the 1967 prices), and additionally directed plaintiff to pay a 70¢/ton delivery charge (A 180, 132-3)<sup>21</sup>. In 1974, defendants claimed that the trucking charge had been increased to 90¢/ton, and sought a further increase (A 237, 239).

Pine Hill's 1971 claim for trucking expenses, and its 1974 claim for increased trucking expenses, was based on a representation that "an independent trucker" was hauling the grit and gravel to Frey (A 245, 133). It later developed that the so-called "independent trucker" was Quadco, an affiliate of defendants, which they bought from Pfohl at the same time that they purchased Frey's gravel supply and plant from Pfohl. It also appeared that Quadco was rebating to Pine Hill as much as \$12,000 per month (A 503, 190; Exhibit B and Exhibits H through J following A 522).

It also developed that defendants' claims of a 70¢/ton or 90¢/ton trucking expense were unfounded. The distance to be covered was only 200 feet (See labeled photograph of Frey's batch plant and Pine Hill's—formerly Frey's Pavement Road gravel plant (A 301). At 70¢/ton Quadco was making a profit of about \$340 per day on Frey (about 1500 per day at 90¢/ton)

<sup>21</sup> The trucking charge is being held in escrow (A 180, 265-6).

and rebating to defendants. Defendants were not even deadheading back, but were picking up materials for Pine Hill on the return trip (A 296-8, 301-2).

#### F. Defendants' Acquisitions and Growth

Defendants have expanded<sup>22</sup> horizontally at two levels—

(1) Ready-mixed concrete, to a point where they control 50% of the ready-mixed concrete in the Buffalo area (A 175, 185-6, 190-1, 196-7, 504)<sup>23</sup>; and,

(2) Gravel to the point "where they have a 100% monopoly of the gravel available in the Buffalo area (A 514-5, 185-6, 190-1, 196-7, 305-6).

This has necessarily also constituted expansion in a vertical direction, and in a cross-vertical direction with respect to its competitor Frey, as can be seen by the following list:

#### DEFENDANTS' MAJOR ACQUISITIONS

##### *Concrete*

Genesee Ready-Mix Co.—1950

Depew Ready-Mix Co., a/k/a Disco or Biscaro Ready-Mix Co.—1950

Paolini Ready-Mix Co.—1956

Blasdell Ready-Mix Co.—1956

Queen City Ready-Mix Co.—1958 (Part Interest)

Vero Ready Mix Co.—1959

Queen City Ready-Mix Co.—1963 (Complete ownership, including acquisition of exclusive-dealing contracts).

<sup>22</sup> Defendants also attempted to acquire plaintiff's plant (A 15 & 17).

<sup>23</sup> Plaintiff was never able to get complete discovery on defendants' acquisitions (A 370, 379, 387, 397, 479-80).

*Gravel*

Genesee Sand & Gravel Co.—1952

Buffalo Sand Co.—1954

Sterling Sand & Gravel Co.—1954

Aero Aggregate Co.—1956

Jameson Bank Run Gravel Co.—1956

Pfohl Bros.—1957 (plaintiff's supplier)

Buffalo Perlite Co.—1957 (light-weight aggregate)

Piechocki Farm—1968 (Land-locked parcel blocking plaintiff's Genesee County gravel pit)

Buffalo Perlite Co.—1970 (Light-weight aggregate)

(Sources: A 176-7, 182-202, 502-5, 514-5; ¶ 18A of Exhibit B, following A 5.)

In addition, Defendant Kahle also acquired joint interests with Clarence Sand and Gravel, a large ready-mixed concrete producer in the Buffalo Area and owner of the only other gravel plant (A 192, 306, 514-5).

#### **G. Defendants' Miscellaneous Restraints**

In addition to the foregoing major restraints, practices, monopolizations and attempts thereat, and acquisitions, defendants also utilized a series of practices which restrained competition. These included:

i—Ready-Mix concrete customer rebates, discounts, free-waiting time, transportation advantages (A 264, 321, 398, 590, 830, 825; R. 84, p. 14).

ii—Tying fill (cheap or free), credit, etc. to ready-mixed concrete sales (A 264, 321, 590; R. 84, p. 19).

iii—Tying gravel sales to grit sales (inferior quality) (A 369, ¶ 6; 280, ¶ 9).

iv—Refusing to deal with plaintiff by allowing defendant Regent to sell to plaintiff on the same terms that Regent sold to Pine Hill (R. 50, p. 14).

v—Using information from pretrial discovery of plaintiff's records to defendants' competitive advantage; and refusing to submit their own similar records for discovery despite agreement therefor (A 315, 380-2, 404-5; 387; R. 64, pp. 1-5, R. 89, p. 27).

## **H. The Concrete and Gravel Markets Involved**

Because of its weight, concrete, as well as its ingredients (grit and gravel) can not be economically transported, and compete in close proximity to their plants.

Plaintiff and defendants compete in the Buffalo Metropolitan Area, which is also known as the Niagara Frontier Area. The "market" is the ready-mixed concrete and gravel market in and about the Niagara Frontier (A 569-70, 591, 12).

### **I. The Cement Market Involved**

The cement market involved is the Buffalo Metropolitan Area which is serviced by and from interstate and international producers (A 570, 589-1, 596-8).

Both Canadian and American out-of-state producers actively compete in this market to affect sales in the Buffalo area.<sup>24</sup> "Volatile" pricing is one of the features of this competition. Pine Hill's annual sales of 150,000 yards of concrete

<sup>24</sup> No cement is manufactured in the Buffalo area, or in New York State within the Buffalo Market.

require approximately 187,500 barrels of cement per year. Frey, at about half of this, requires almost 100,000 barrels. The total cement market is about \$3,000,000 per year, of which 50% is interstate and 50% is international (A 568-9, 565-8, 587-9, 590-9).

Defendants' actions directed against plaintiff, with the intent of decreasing plaintiff's share of the market, have apparently tended to cause plaintiff to receive less favorable cement prices in this market (A 569, 590, 587).

#### **J. The "Commerce" Involved**

The interstate commerce involved and adversely affected by the actions herein, is multi-faceted and inter-related:

1—The ready-mixed concrete and construction industry in, on and for the Niagara Frontier, includes: Buffalo Harbor; Buffalo Port of Entry into and from Canada; Buffalo International Airport; Federal Defense and Governmental agencies; International Peace and Railway Bridges over the International Boundary and waters; federal interstate highways; interstate electromagnetic communication; interstate and international railroad facilities; United States post office facilities; interstate and international power and communication facilities; interstate and international bus and truck terminals; United States Army flood control projects; Great Lakes, Niagara River harbor breakwalls; etc. (A 491-5, 583-6).

2—Plaintiff Frey and defendant Pine Hill directly import across state and international boundaries: approximately \$2,000,000 cement annually from Ontario, Ohio and Michigan (of this approximately \$1.7 million is shipped, brought into the State by the manufacturer, and

delivered from its rail cars, silos or warehouses in the Buffalo area); approximately \$60,000 additives from Ohio, Ontario (of this approximately \$25,000 is brought in by the manufacturer and stores pending purchase); approximately \$250,000 light-weight aggregates. Assuming that this represents  $\frac{2}{3}$  to  $\frac{3}{4}$  of the imports of all ready-mixed concrete producers, the total imports are approximately \$3,000,000 per year<sup>25</sup>, of which approximately \$800,000 are imported directly by the concrete producers, and \$2,200,000 are indirectly imported by the concrete producers (A 563-70, 596-9, 175, 496-8).

3—Sales of ready-mixed concrete (no figures available in Record) to producers of products approximately 50% of which are shipped across state lines, such as highway guard rails, and pre-cast retaining wall sections (A 494, 583).

The "commerce" allegations of the complaint cover each of these phases of the interstate and international commerce "involved" or "affected" (A 9-11, 15, 18). Plaintiff repeatedly sought completion of its discovery on "commerce" and called to the District Court's attention that it was disadvantaged by the very limited discovery, and lack of depositions accorded it (A 1330, 595, 582, 547, 569, 586; see also "Statement", *supra*).

<sup>25</sup> This does not include imports of equipment, fuel for heating aggregates and concrete, fuel for delivery trucks, plants, etc. (A 497)

## POINT I

**Defendants monopolized and restrained trade in the concrete, gravel and cement markets in violation of Sherman Act §§ 1 and 2.**

Defendants, by their horizontal and vertical acquisitions<sup>26</sup>, monopolized the grit and gravel markets,<sup>27</sup> and attempted to monopolize the ready-mixed concrete market, in the Buffalo Area in violation of Sherman Act § 2.

Defendants, by said acquisitions, and their other restraints, also restrained trade in said markets, as well as in the cement market, in violation of Sherman Act § 1.<sup>28</sup>

Defendants' actions achieved for them an almost 100% monopoly in the gravel market, a 50% share of the ready-mixed concrete market,<sup>29</sup> and more favorable prices in the cement market than were available to plaintiff.<sup>30</sup>

Thus, interstate and foreign trade and commerce, were attempted to be, and were in fact, monopolized and restrained. This is not a "pinch" or "squeeze" case—but rather one of direct and devastating restraints, and actual monopolization. *U.S. v. Women's Sportswear Mfg. Ass'n*, 336 US 460, 464, 93 L.Ed. 2d 805 (1949); *U. S. v. Yellow Cab Co.*, 332 US 218, 230-4, 91 L.Ed. 2d 2010 (1947), *Montague & Co. vs. Lowry*, 193 US 38, 48 L. Ed. 608 (1904); *Fortner Enterprises v. U. S. Steel*, 394 US 495, 22 L.Ed. 2d 495 (1969); *U. S. v. Socony-Vacuum Oil Co.*, 310 US 150, 84 L.Ed. 2d 1129 (1940).

<sup>26</sup> Defendants' acquisitions are listed under Facts, "F", *supra*.

<sup>27</sup> The gravel and concrete, and the cement, markets are defined under Facts, "H" & "I", *supra*.

<sup>28</sup> Defendants' *per se* § 1 violations are separately treated under Point II, *supra*.

<sup>29</sup> See Facts, "F" and "D", *supra*.

<sup>30</sup> See Facts, "I", *supra*.

## POINT II

### Defendants' actions constituted *per se* violations of Sherman Act § 1.

Defendants' actions and restraints were so patently unreasonable and blatantly unjustifiable as to constitute *per se* violations of Sherman Act § 1. Defendants' concerted actions, which we claim as *per se* restraints,<sup>31</sup> include:

#### A. Gravel price fixing:

Fixing the prices of grit and gravel, by raising them to, and fixing them at, high, unreasonable and arbitrary levels; especially after monopolizing the Buffalo gravel market and the sole source of gravel supply for plaintiff's Lancaster plant. Defendants employed arbitrary, excessive and unjustified non-linear increases, "tailored" to the results that it desired to accomplish against plaintiff. (See Facts, "D", "E" & "F", *supra*).

#### B. Concrete price fixing:

Fixing the prices of ready-mixed concrete market by lowering concrete prices to, and fixing concrete prices at, unreasonably low, out-dated, and below-cost levels; especially after previously raising the prices of grit and gravel that defendants supplied to their competitor, plaintiff. Defendants maintained a below-cost April 1971 concrete price<sup>32</sup> of \$22.00 per yard through the five subsequent years that action was pending (1971 through 1975), despite the admitted "double-digit" inflation (which they were using to justify an increase in the price

<sup>31</sup> We claim these to also constitute Clayton Act violations, and evidence of violations of Sherman Act § 2.

<sup>32</sup> They even gave substantial discounts, benefits, and rebates on these below-cost prices which yielded an effective price of \$20.50 (A 402, 405h).

of grit and of gravel sold to plaintiff), as well as cement, labor, fuel increases of more than \$3.00 per yard. (See Facts, "E", *supra*).

**C. Tie-in sales:**

Defendants used "tailored", distorted and non-linear price increases for their gravel, in order to force plaintiff to buy defendants' inferior, wet, dirty, poorly-graded and overpriced grit. Defendants also tied free or cheap fill, and credit, to sales of its ready-mixed concrete. (See Facts, "D" & "G", *supra*).

**D. Supplier Acquisition:<sup>33</sup>**

Defendants acquired the sole supplier of plaintiff's Lancaster ready-mix concrete plant, which completed their acquisition of a 100% monopoly of all available gravel in the Buffalo area. (See Facts, "D", *supra*).

**E. Refusals to Deal:**

Defendants refused to allow defendant Regent to sell grit and gravel to plaintiff on the same terms and conditions that Regent sold grit and gravel to its parent corporation, defendant Pine Hill; especially after defendants acquired plaintiff's grit and gravel supply and washing plant from defendants Pfohl, and plaintiff's gravel supply agreement. Defendants admitted that Regent sold its entire output, including from plaintiff's former plant, to defendant Pine Hill, and required plaintiff to deal with Pine Hill. Meanwhile defendants had a rebating arrangement between Pine Hill and Regent and their other gravel acquisitions,<sup>34</sup> as well as between Pine Hill and Quadco,

<sup>33</sup> Supplier Acquisition and Refusals to Deal, *infra*, while not "classic" *per se* violations, certainly can be, and, especially under the circumstances here present, should be deemed to be *per se* violations.

<sup>34</sup> (A 400-1).

the trucking company owned by defendants and for which they used to charge plaintiff exorbitant trucking charges. (See Facts, "D" & "E", *supra*).

Price fixing is a practice so patently unreasonable that it is deemed *per se* to constitute a violation of Sherman Act § 1. Price fixing is one of the classic *per se* restraints. *U. S. vs. Socony-Vacuum Oil Co.*, *supra*; *Hudson Valley Asbestos Corp. vs. Tougher Heating & Plumbing Co., Inc.*, 510 F 2d 1140 (2 Cir., 1975) cert. den. 421 US 1011; *Jacobi vs. Bache & Co., Inc.*, 520 F 2d 1231 (2 Circ., 1975), affirming 377 F Supp. 86, cert. den. .... US ...., 96 SCt 784; *George R. Whitten, Jr., Inc. vs. Paddock Pool Builders, Inc.*, 508 F 2d 547 (1 Cir., 1974), cert. den. 421 US 1004.

Tying arrangements are usually held to be *per se* restraints. *Fortner Enterprises, Inc. vs. U. S. Steel Corp.*, *supra*; *Northern Pacific Ry. Co. vs. US*, 356 US 1, 2 L. Ed. 2d 545 (1958); *Cheryl Perry Hill, et al. vs. A-T-O, Inc.*, .... F2d .... (2 Circ., 1975, Docket 75-7295); *Rex Chainbelt vs. Harco Products, Inc.*, 512 F 2d 993 (9 Cir., 1975).

Refusals to Deal, and allocation of territories, may also constitute *per se* restraints. *US vs. Arnold, Schwinn & Co.*, 388 US 365, 18 L.Ed. 2d 1249 (1967); *U. S. vs. Topco Associates*, 405 US 596, 31 L.Ed. 2d 515 (1972); *White Motor Co. vs. US*, 372 US 253, 9 L.Ed. 2d 738 (1963); *Modern Home Institute, Inc. vs. Hartford Accident & Indemnity Co.*, 513 F. 2d 102 (2 Cir., 1975); *Adolph Coors Co. v. Federal Trade Commission*, 497 F 2d 1178 (10 Cir., 1974), cert. den. 419 US 1105.

Acquiring a competitor's source of supply, particularly where it climaxes a program of years of acquisitions, and results in almost a 100% monopoly *Ozdoba vs. Verney Brunswick Mills, Inc.*, 152 F Supp 136 (SDNY, 1946); Cf. FTC "Enforcement Policy with respect to vertical mergers in the Cement

*Industry*", *supra*. Such acquisitions should also be deemed a *per se* violation:

\*\*\*\*\* because of their pernicious effect on competition and lack of any redeeming virtue \*\*\*\*\*". (Justice Black, in *Northern Pacific Ry. Co. vs. US*, *supra*, speaking of tying, at page 5).

### POINT III

**Defendants' discriminatory pricing, rebates, tie-ins, acquisitions, and, refusals to deal, monopolized and/or restrained trade in the concrete, gravel and ready mix markets violated Clayton Act §§ 2, 3 & 7, Robinson-Patman Act § 2(a) and Sherman Act §§ 1 & a.**

Even without the benefit of any discovery except some initial Interrogatories, many of which were never answered, and a limited scan of certain of defendants' records, it appeared that defendants had engaged in a compendium of violations of the antitrust laws.

These included price discrimination; discounts, waiting time credits, and rebates to concrete customers; tie-in sales with free or cheap fill and credit; vertical and horizontal gravel and concrete acquisitions; price fixing; refusals to deal with plaintiff for gravel on the same wholesale terms as enjoyed by defendant Pine Hill, etc. (see Facts, "G", *supra*).

Especially when viewed in the light of defendants' two-tiered horizontal, and its vertical, monopolization of gravel and concrete, and especially defendants' vertical monopolization of plaintiff's supplier, these predatory actions, must be presumed to have adversely affected the in-

terstate and foreign trade and commerce in cement,<sup>35</sup> additives and aggregates, to say nothing of the traditional local ready-mix concrete market, in violation of both the Sherman Act and the Clayton Act, as amended.

The "primary vice" of such vertical mergers, and the reason for Clayton Act condemnation thereof, is that way, as here, they foreclose competitors:

"... from segment of the market otherwise open to them ... and act as a 'clog on competition' ... which deprive ... rivals of a fair opportunity to compete".

*Brown Shoe Co. vs. U.S.*, 370 US 294, 8 L Ed 2d 510 (1962).

#### POINT IV

**Defendants and plaintiff were engaged "in" commerce and defendants' actions adversely "affected" commerce.**

Plaintiff submits that defendants and plaintiff were each engaged "in" commerce within the meaning of the Clayton Act and the Sherman Act, in the following respects:

##### A. Ready-Mixed Concrete

The manufacture, sale and delivery of ready-mixed concrete;<sup>36</sup> and with respect to, and on and over, *international*: vehicular and railway bridges, harbors, airports, bus terminals, railway depots, truck terminals, communications systems, river breakwalls, etc. See Facts, "H" & "J(1)".

<sup>35</sup> Defendants were thus able to obtain more favorable cement prices than were available to plaintiff (See Facts, "I", *supra*).

<sup>36</sup> Defendants were also so engaged with respect to grit and gravel.

## B. Cement, cement additives and aggregates

The direct purchase and importation in interstate and foreign commerce of cement, cement additives and lightweight aggregates, etc., of substantial amount. See Facts, "I" & "J(2)".

## C. Concrete pre-cast products

The sale of concrete for use in cast concrete products shipped across state boundaries in "not unsubstantial" amounts. See Facts, "J(3)".

Plaintiff further submits that, and *a fortiori*, defendants' actions adversely "affected" said commerce within the meaning of the Sherman Act.

Because of the basic nature of the products, the weight of the ingredients and the product, and the ubiquitous use of the product in every phase of construction, the ready-mixed concrete and the cement industries in each local metropolitan area, traditionally have been considered to be the relevant market within the purview of the Sherman and Clayton Acts. *U. S. v. Richter Concrete Corp. et al.*, 328 F Supp 1061, 1971 Trade Cases ¶ 73, 520, Consent Decrees 1972 Trade Cases ¶ 74, 151 (S.D. Ohio, 1971-2); *Johnson v. Ready Mix Concrete Co.*, 318 F Supp 930 (D. Neb., 1970); *U. S. vs. Teamsters Local 639*, 32 F Supp. 594 (DC, 1940); *Consolidated Edison Co. vs. DiMuzoli*, 1970 Trade Cases ¶¶ 73,218 and 73,358 (SDNY, 1970); *OKC Corp., et al.*, Federal Trade Commission Docket 8802, CCH Trade Regulation Reports ¶¶ 19,369 & 4330.63 (1970). See also Federal Trade Commission "Enforcement Policy with Respect to Vertical mergers in the Cement Industry," CCH Trade Regulation Reports ¶ 4520 (Released

1/17/67), where the commission in discussing the concrete and cement industries, found as follows:

"In summary, *metropolitan centers are focal points of cement demand* and are regarded by cement companies as key marketing areas. It is within these centers that the effects on competition resulting from vertical acquisitions tend to be most keenly felt.

\* \* \* \* \*

"Similarly, although there are well over 4,000 ready-mixed concrete producers in the United States, the major needs of most urban areas are supplied by a few sizable ready-mixed firms. Concrete is a highly perishable commodity of great bulk and weight, and, even more crucially than the case of cement, high transportation costs in comparison with the selling price limit the area serviceable from a particular plant. *Concrete is normally not transported more than five to ten miles from the production site to the construction job of the purchaser. Any given metropolitan area would, therefore, appear to be a definitive market for concrete production and sale* \*\*\* in most urban centers, the ready-mixed concrete industry is quite concentrated. For example, *the four largest ready-mixed concrete companies doing business in San Francisco, Boston, Cleveland, Milwaukee, New York, Buffalo*<sup>37</sup> \*\*\* made approximately 50% or more of the concrete sales in those cities.

\* \* \* \* \*

"In any given metropolitan market, *ready-mixed concrete producers are therefore dominant cement consumers* and constitute the *crucial link* in cement distribution and use. When one or more major ready-mixed concrete firms are tied through ownership to particular cement suppliers, the resulting foreclosure not only may be significant in the short run, but may impose heavy long-run burdens on the disadvantaged cement suppliers.

<sup>37</sup> Defendants, themselves have about 50% of the market in the Buffalo Area. See Facts, "F", *supra*.

"The *unintegrated* ready-mixed concrete producers furthermore may be at a disadvantage in competing with rivals who are integrated cement and concrete manufacturers \*\*\*".

\* \* \* \* \*

"In general, the acquisition\*\*\* of any ready-mixed concrete company or other cement consumer which regularly purchases 50,000<sup>38</sup> barrels of cement or more annually will be considered to constitute a substantial acquisition." (*Italics supplied*).

The District Court failed to comprehend that the Supreme Court's decision in *Gulf Oil Corp. vs. Copp Paving Co.*, 419 US 186, 42 L.Ed. 2d 378 (1974) did *not* extend to Clayton Act or Sherman Act claims involving the liquid asphalt oil (*Cf.* cement in our case) even though it was manufactured wholly within the State of California; nor did the *Copp* decision extend to Sherman Act claims involving asphaltic concrete.

The Supreme Court noted at pages 192-3 of its opinion, that certiorari was limited to the applicability of Clayton Act §§ 3 and 7, and Robinson-Patman Act § 2(a), to production of asphaltic concrete for intrastate portions of interstate highways<sup>39</sup>.

Defendants in the *Copp* case did not move for dismissal of the Sherman Act § 1 charges of price fixing and market allocations, or of the Clayton Act § 7 and Robinson-Patman Act § 2(a) charges of acquiring a competitor on price discrimination, in the sale and distribution of asphalt oil (*Ibid.* 190-1).

<sup>38</sup> Defendants use about 187,000 barrels annually, and plaintiff uses about 100,000 barrels (See Facts, "I," *supra*).

<sup>39</sup> The acts reviewed were limited to:—Clayton Act § 7—acquisition of asphaltic concrete a competitor; and Clayton Act § 3 and Robinson-Patman Act § 2(a)—Sully-Miller's price discrimination, and tying, in the local asphaltic concrete market.

Defendants in the *Copp* case moved only for summary judgment as to Sully-Miller for violations in the asphalt concrete market. The Ninth Circuit reversed the District Court's dismissal of "all claims against Sully-Miller and those claims against the other defendants involving \*\*\*\*\* asphaltic-concrete" (487 F 2d 202, 204). The Supreme Court's reversal did not affect the charges of acquisition of a competitor, attempted and actual monopoly price fixing, and market allocation in the manufacture and sale of asphaltic-concrete in the Los Angeles area market in violation of Sherman Act §§ 1 & 2 (*Id.* 192).

The District Court's reliance on this Court's decision in *Lieberthal vs. North County Lanes, Inc.*, 332 F 2d 269, 272 (2d Cir. 1964) was inappropriate, since in the case at bar both plaintiff and defendants are engaged in commerce, and defendants' actions vitally "affect" the interstate commerce of plaintiff's business, as well as the other businesses, in the Buffalo area concrete, gravel and cement markets.

The District Court's opinion below criticized the complaint for not alleging "the relevant market involved or the proportion of the market which it is claimed the defendants control \*\*\* or the facts which reveal an unlawful conspiracy \*\*\*" (A 610). Appellant submits that the complaint sufficiently alleges the commerce involved (Complaint ¶¶ 8-12, A 9-11), and ¶ 22 (A 15), alleges *inter alia* that defendants' wrongful plan and conspiracy was for the purpose of monopolizing trade and commerce in the gravel and ready mix businesses.<sup>40</sup>

Under such circumstances, it is not necessary to plead or prove a relevant market but only to plead defendants' intent to monopolize. *U.S. vs. Yellow Cab Co.*, *supra*, *U.S. vs. Con-*

<sup>40</sup> Defendants were never allowed to take depositions, or complete their discovery, and they serve an amended complaint (See "Statement", *supra*).

*solidated Laundries Corp.*, 291 F 2d 263, (2 Cir. 1961); *Lessig vs. Tidewater Oil Co.*, 327 F 2d 459, (9 Cir. 1964).

Nevertheless, and even with respect to the monopolization allegations, the complaint alleged a relevant market—the Buffalo Area—the County of Erie (Complaint ¶¶ 10-17, A 10-12) defendants'—and also alleged in ¶¶ 22 and 28 (A 15 & 18) the concerted wrongful actions therein:

"to secure for the defendants Kahle, Pine Hill and Regent a present and continuing monopoly in the production, sale and supply of gravel and ready-mix concrete \*\*\*; a present and continuing control by defendants, as competitors of plaintiffs, of plaintiffs' available gravel sources and supplies; \*\*\* and a present and continuing agreement, combination, conspiracy \*\*\* to accomplish all of the foregoing \*\*\*\*".

(see also ¶ 30 and ¶ 11 which allege defendants' "objective of monopolizing and restraining said trade and commerce and said gravel and ready-mix business" (A 18 & 10)).

The complaint thus alleges monopolization and an attempt and conspiracy to monopolize the gravel and ready-mix concrete businesses in the local metropolitan area, that limited relevant market peculiar to said industries.

Defendants' acquisitions, either in the gravel market or in the concrete market, tended to effect a monopolization of the ready-mix concrete industry in the local geographic Buffalo market, and to affect interstate commerce in the cement purchases and deliveries in interstate commerce of the ready-mix concrete producers in that market (Complaint ¶¶ 12, 22, 28 & 30, A 11, 15 & 18).

## POINT V

**Plaintiff was deprived of its rights to discovery and to thereafter serve an amended complaint, before facing a motion for summary judgment.**

### **A. Plaintiff was not allowed any depositions**

During the entire five-year history of this action, plaintiff was never allowed to take a single deposition! Plaintiff served 18 separate pleadings<sup>41</sup> requesting the right to take depositions, (see "Discovery History" set forth under "Statement", *supra*). Defendants, on the other hand, deposed plaintiff on numerous occasions and completed all of their desired depositions (R. 90-101; A 617-1073).

At the conclusion of the defendants' final deposition of plaintiff on December 30, 1974, the Magistrate stated:

"The only thing that might remain would be the commencement and the continuation of the examination of the defendants by the plaintiff \*\*\*" (A 1073; R. 101, p. 105, *et seq.*).

*That day never came* since on January 10, 1975 defendants moved for summary judgment and for dismissal of the complaint (A 406) and on January 24, 1975 defendants moved to stay plaintiff's discovery (A 479).

Plaintiff thereafter made 5 separate written applications to the Court to continue its discovery before the Court ruled on defendants' motion to dismiss (A 1335, 488-522, 547, 1330 and 580-599).

<sup>41</sup> Plaintiff also made numerous informal requests in affidavits, Court appearances and briefs.

### **B. Plaintiff could not get answers to material interrogatories**

Plaintiff served two sets of interrogatories (A 43 & 80). Plaintiff had to move several times to overrule the objections and compel answers to the interrogatories (A 77, 91, 94, 161 & 225). When it finally received the answers there were many objections. The objections related to some of the most pertinent<sup>42</sup> questions (A 71, R. 14, and A 182, 188, 192, 195 & 199). Plaintiff never received any ruling on these motions on defendants' objections, and never received any further answers to its interrogatories.

### **C. Plaintiff had very limited document inspection**

Late in the case, and on the eve of defendants' motion to dismiss, plaintiff was allowed a limited "scan" of certain of defendants' records (A 547, 1335). Plaintiff thus discovered defendants' rebate system, through some invoices which defendants inadvertently allowed to remain in the limited records they furnished to plaintiff. When this was discovered defendants removed them from the files (A 551) and all plaintiff has is a few handwritten excerpts (see Exhibits "C" through "J" following A 522, & Facts "E", *supra*).

### **D. The Court dismissed because of the absence of depositions**

Most strangely, after *denying* plaintiff the right to take depositions, the District Court dismissed for lack of evidence of commerce in *the depositions*:

"... *the depositions filed fail to set forth facts revealing any further interstate activity or an effect on commerce sufficient to allow this action to proceed*" (A 612, *Italics ours*).

<sup>42</sup> e.g., Interrogatory No. 19 requesting the prices at which Regent sold gravel to Pine Hill and others (A 85, 196); No. 20 requesting information on rebates (A 85, 196); No. 2 requesting information on relationships between defendants (A 46).

The Court denied plaintiff the right to take depositions, and then dismissed because plaintiff filed no depositions!

**E. The motion for summary judgment was premature**

The Court in its opinion noted that:

"Because numerous affidavits have been filed and *depositions taken*, the primary motion before the Court at present is one for summary judgment" (A 604).

The Court was apparently relying on FRCP 12(b) and (c) which allow the Court to consider a motion to dismiss "as one for summary judgment" and disposed of as provided in Rule 56.

However, the Court ignored the proviso that "all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56". Plaintiffs repeatedly asked the Court, following defendants' motion, for discovery and leave to file an amended complaint, and at the very least to complete their discovery as to the "commerce" issues (A 1335, 518-9, 522, 547, 1330, 580-99).

**F. Plaintiff should have been allowed to serve an amended complaint after completion of its discovery**

In its opinion, the Court noted that plaintiff did not serve an amended complaint before the Court ruled on defendants' motion. On numerous occasions, plaintiff informed the Court that it would serve an amended complaint after it had completed discovery (A 1336, 1330; R. 84, p. 1-2).

The Court insisted on seeing the amended complaint before it would rule on plaintiff's many motions to serve the amended complaint, and yet the Court would not allow plaintiff to complete discovery and have the depositions, necessary to draw an amended complaint. The plaintiff submits that in the

absence of discovery and depositions, plaintiff's many affidavits (supporting plaintiff's motion to serve an amended complaint, supporting its many discovery attempts, and in opposition to defendants' motion to dismiss) adequately showed the Court the nature of the claims which could be set forth in the amended complaint. More than that required discovery and depositions which the Court would not permit!

Plaintiff submits that amending a complaint without discovery or depositions, is like building castles in the air and that plaintiff was entitled to complete its discovery and serve an amended complaint, if one indeed be needed.

Plaintiff was unable to convince the Court, or the Magistrate to whom discovery was finally assigned, to allow simultaneous discovery, or discovery in waves as contemplated by the 1970 amendments to FRCP 26(d) and the Manual for Complex Litigation, entitled "Sequence of Discovery" (§§ 0.50, 1.11(g), 1.50, 2.00(c) & (d), 2.20, 2.30).

As noted under §2.11 of the Manual, entitled "Summary Judgment in Complex Cases":

"Ordinarily a motion for summary judgment should not be granted until a reasonable opportunity to complete discovery has been afforded, on this issue or issues material to the summary judgment. fn. *Poller vs. Columbia Broadcasting System, Inc.* 368 US 464, 7 L.Ed. 2d 458 (1962)\*\*\*"

The Supreme Court in its decision in *Gulf Oil Corp. vs. Copp Paving Co.*, *supra*, noted that:

"The District Court ordered full discovery as to jurisdiction of *Copp's* asphaltic concrete claims\*\*\* *Copp* was allowed full discovery as to all interstate commerce issues".

See also *Cheryl Perry Hill, et al. vs. A-T-O, Inc., et al.*, *supra*; *Heyman vs. Commerce and Industry Insurance Co.*, 524 F 2d 1317 (2 Cir., 1975); *Michael Judge vs. City of Buffalo* 524 F 2d 1321 (2 Cir., 1975).

Plaintiff further submits that, if, *arguendo*, the District Court was justified in granting defendants' motion to dismiss, the Court erred, and abused its discretion, in failing to allow plaintiff the right to replead within a reasonable period of time thereafter.

## POINT VI

**Pre-1966 activities were apparently considered "as part of the history" rather than as evidence of defendants' conspiracy.**

The District Court, in granting defendants' motion, noted that "many of the allegations contained in the complaint refer to events which occurred long before June 1966." the Court stated that they "may be considered as part of the history..." (A 609-10).

However, the Court then went on to hold that there was no allegation or evidence of "an unlawful conspiracy or a combination" (A 610), and that "the affidavits supplied by plaintiffs in this action relate only to the claim of breach of contract by the defendants, but do not set forth in any way any facts which indicate an interstate activity under either of the antitrust statutes" (A 612).

The only conclusion, inferable from this, is that the Court ignored defendants' acquisition in 1957 of plaintiff's source of gravel supply, and defendants' other monopolistic acts and restraints, as evidence of a continuing combination con-

spiracy which had the ultimate intent of eliminating plaintiff as a competitor and allowing defendants to acquire plaintiff's business at a depressed price (see Complaint ¶¶ 27(k), 22 & 28-30; A 15, 17-18).

In any event, the complaint alleged, and the evidence was presented, that in 1969 defendant Kahle belatedly recorded a deed conveying plaintiff's gravel supply and washing plant to the defendant Regent (Complaint ¶¶ 26 & 27 (h); A 16-17, 465-467; the Deed from defendant Kahle, as President of Pfohl, dated "1957" was recorded on May 1, 1969 (see tax stamp at bottom of A 466). This is the same defendant Regent that defendants previously claimed was an inactive company (A 135), but which now admittedly operates, sells gravel only to Pine Hill, refuses to sell gravel to plaintiff at the same prices that it sells to Pine Hill, and makes substantial rebates to Pine Hill (Exhibit G following A 177), and Facts, *supra*.

This is not just "history" as the District Court viewed it, but compelling "evidence" of an initial and continuing conspiracy and combination to monopolize and restrain trade and damaged plaintiff.

We submit that, the District Court erred in granting defendants' motion for summary judgment, and treating plaintiff's pre-1966 allegations as "history" under the foregoing circumstances, and particularly where the Court denied plaintiff's discovery and depositions, particularly after they inadvertently stumbled upon defendants' rebate system (see *Independent Taxicab Operators Assn. vs. Yellow Cab Co.*, 278 F Supp 979, 986 (ND Cal, 1968); *Doveberg vs. Dow Chemical Co.*, 195 F Supp 337, 342 (E D Penn. 1961).

## POINT VII

**The District Court should not have dismissed the non-federal claims, after delaying for 4 years a ruling on plaintiff's motion for separate trials, and after holding over \$100,000.00 of plaintiff's money.**

Assuming, *arguendo*, that the District Court properly dismissed the first claim for lack of federal jurisdiction under 28 USCA § 1337, the Court abused its discretion in also dismissing the non-federal claims, particularly where the Court had refused to rule on plaintiff's early motion for separate trials of the federal and non-federal claims and had filed a note of issue therefor (A 161, 209), and after the Court had forced plaintiff to pay defendants the exorbitant delivery fee of 70¢ per ton, and the Court was holding over \$100,000.00 in an escrow account (A 180, 265, 348).

See *Watkins vs. Grover*, 508 F 2d 920, 921 (9 Cir. 1974); *Murphy vs. Kodz*, 351 F 2d 163, 167 (9 Cir. 1965); *Gamage vs. Peal*, 217 F Supp 384 (ND Cal. 1962); *Cf. Brough vs. United Steel Workers of America*, 437 F 2d 748, 750 (1 Cir. 1971).

### Conclusion

Appellants submit that the District Court erred in granting defendants' motion to dismiss and for summary judgment; and, in any event, erred in refusing to allow plaintiff to complete its discovery, take depositions, and to thereafter serve an amended complaint in the light thereof.

Appellants suggest that the Court consider, on remand, the desirability of remanding the case to a different District Judge in Buffalo or Rochester, or even in the northern or southern district, or to a Master, for a fresh approach.

Appellants further submit that the Decision of the District Court should be reversed, and the case remanded to the District Court.

Dated: Buffalo, New York  
September 8, 1976.

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#75-7698

State of New York )  
County of Genesee ) ss.:  
City of Batavia )

RE: George C. Frey Ready-Mixed  
Concrete, Inc. et al  
vs  
Pine Hill Concrete Mix Corp  
et al

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Leslie R. Johnson

Sworn to before me this

10th day of September, 19 76

Patricia A. Lacey

PATRICIA A. LACEY  
NOTARY PUBLIC, State of N.Y., Genesee County  
My Commission Expires March 30, 19 77

